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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 108

JOSEPH E. SWANSON ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 7, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 108

JOSEPH E. SWANSON ET AL., AS TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Joseph E. Swanson, James Otis and Allen G. Mills, as Trustees of the Lake View Land Association,

Petitioners,

vs:

Commissioner of Internal Revenue,

Respondent.

Docket No. 32572. Appearances

For Taxpayer: Arnold R. Baar, Esq., W. A. Giffen, Esq.;

For Comm'r.: E. A. Tonjes, Esq.,

DOCKET ENTRIES.

1927

Nov. 29—Petition received and filed. Taxpayer notified. (Fee paid)

Nov. 30—Copy of petition served on General Counsel.

1928

Jan. 28—Answer filed by General Counsel.

Jan. 30—Copy of answer served on taxpayer. General Calendar.

Feb. 7—Order that proceeding be p[illegible] on Circuit Calendar for hearing in Chicago, entered.

1929

May 17—Motion to consolidate with docket 41318 filed by taxpayer. 5/31/29 granted.

May 31—Notice of appearance of W. A. Giffen as counsel for taxpayer filed by A. R. Baar.

1932

July 12—Hearing set for week of Sept. 6, 1932 at Chicago, Illinois.

Sept. 7—Hearing had before S. J. McMahon, Div. 16. Submitted on merits. Briefs due in 90 days, 30 days for reply. (Called Sept. 6, 1932.)

Sept. 21—Transcript of hearing of Sept. 7, 1932 filed.

Dec. 3—Motion for extension of 15 days to file brief filed by taxpayer. Granted 12/3/32.

Dec. 6—Memorandum in regard to brief filed by General Counsel.
Dec. 6—Brief filed by General Counsel.
Dec. 20—Motion for extension of 30 days to file brief filed by taxpayer. 12/20/32 granted.

1933

Jan. 26—Brief and requested findings of fact filed by taxpayer. 1/28/33 copy served.

1934

Feb. 26—Memorandum opinion rendered, S. J. McMahon, Div. 16. Decision will be entered for respondent.
Feb. 28—Decision entered Stephen J. McMahon, Div. 16.
May 21—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.
May 21—Proof of service filed by taxpayer.
Jul. 11—Praecipe with proof of service thereon filed.

2 Joseph E. Swanson, James Otis and Allen G. Mills, as Trustees of the Lake View Land Association,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 41318.

Appearances

For Taxpayer: Arnold R. Baar, Esq., W. A. Giffen, Esq.,
For Comm'r.: E. A. Tonjes, Esq.,

DOCKET ENTRIES.

1928

Nov. 5—Petition received and filed. Taxpayer notified. (Fee paid)
Nov. 6—Copy of petition served on General Counsel.

1929

Jan. 5—Answer filed by General Counsel.
Jan. 8—Copy of answer served on taxpayer. General Calendar.

Feb. 5—Order to withdraw from General Calendar and place on Circuit Calendar to be heard in the vicinity of Chicago, entered.

May 17—Motion to consolidate with docket 32572 filed by taxpayer. 5/31/29 granted.

1932

July 12—Hearing set week beginning Sept. 6, 1932 at Chicago, Illinois.

Sep. 7—Hearing had before Mr. McMahon, Div. 16. Submitted on merits. Briefs due in 90 days—30 days for reply. Called 9/6/32.

Sep. 21—Transcript of hearing of Sept. 7, 1932 filed.

Dec. 3—Motion for extension of 15 days to file brief filed by taxpayer. Granted.

Dec. 6—Memorandum in regard to brief filed by General Counsel.

Dec. 6—Brief filed by General Counsel.

Dec. 20—Motion for extension of 30 days to file brief filed by taxpayer. Granted.

1933

Jan. 26—Brief and requested findings of fact filed by taxpayer. 1/28/33 copy served.

1934

Feb. 26—Memorandum opinion rendered, S. J. McMahon, Div. 6. Decision will be entered for respondent.

Feb. 28—Decision entered, Stephen J. McMahon, Div. 16.

May 21—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

May 21—Proof of service filed by taxpayer.

Jul. 11—Praecipe with proof of service thereon filed.

3 UNITED STATES BOARD OF TAX APPEALS.

Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association,
Petitioners,
v.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 32572.

PETITION.

Filed Nov. 29, 1927.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:FAR:A1:JDL-60D) dated October 1, 1927, and as a basis of their proceedings allege as follows:

1. The petitioners are the duly qualified and acting trustees of a trust created under declaration of trust, under the laws of the State of Illinois, and its address is c/o Willoughby & Company, 77 W. Washington Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached, was mailed to the taxpayers on October 1, 1927, as the petitioners believe.

3. The taxes in controversy are income taxes for the
4 calendar year 1925. The deficiency asserted is $1,635.27, all of which is in controversy, and the petitioners claim that a refund is due to them.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Status of Petitioners for Tax Purposes.—In determining the tax liability for the year 1925, the Commissioner has erroneously treated the petitioners, as trustees, as if the trust were an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1926 and Article 1502 of Regulations 69. Petitioners allege, however, that the trust does not constitute an association under the statute and that its income is properly taxable as the income of a trust fiduciary, under Section 219 of the Revenue Act of 1926. The income received by the petitioners, being currently distributable, is properly taxable only to the beneficiaries under Section 219 (b) (2) of the Revenue Act of 1926.

(b) Allowance for Depreciation, Including Obsolescence.—In his determination of the amount deductible as a reasonable allowance for depreciation, including obsolescence, of the building owned by the petitioners, the Commissioner has erroneously computed the amount of such a deduction upon the basis of a rate of 4% of cost, whereas a rate of approximately 6% should be used as a reasonable rate for such depreciation, including obsolescence.

5. The facts upon which the petitioners rely are as follows:

(a) Status of Petitioners for Tax Purposes.—Under the declaration of trust, under which the above mentioned trust was organized, and in the activities and practices of the trustees thereunder, the said trust has none of the essential characteristics of an association under the statute and regulations, but is merely a trust estate.

The declaration of trust states that the trust was organized to acquire title to a specified parcel of real estate, to be held under the trust. The activities of the trust have consisted merely of the holding of this property and the collection of the income from the apartment building with which it is improved, and the distribution of the net income among the beneficiaries. The operation of the property is in the hands of agents, as would be the case under any testamentary or other strict trust.

The trustees are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. The beneficiaries have no control over the trust and under the declaration of trust the beneficiaries have no functions or powers except the right to amend the declaration of trust by the agreement of the holders of three-fourths or more in value of the receipts issued to beneficiaries.

The organization of the trust does not in any manner resemble the form or methods used by incorporated bodies. No provision is made for managing officers but all powers are exercised by the three trustees, or, subject to certain limitations, by any two of them. The trustees are not associated together with similar or greater powers than the directors in a corporation nor is the trust organized for the purpose of carrying on any business enterprise.

The net income in the hands of the trustees is required by the declaration of trust to be paid and divided to and among the beneficiaries semi-annually or oftener, in the discretion

of the trustees, and such net income has been currently distributed to the beneficiaries as thus required, (with the exception of a small amount of income of 1925 which was not distributed and was reported as the income of the trust estate).

7 (b) Allowance for Depreciation, Including Obsolescence.—The building owned by the trust is an apartment building of three stories and basement, which was constructed in 1915, and which contains 9 apartments of 7 to 10 rooms each, which are rented to produce the income of the trust. It is located on the corner of Briar Place and Sheridan Road, the latter being one of the principal boulevards in Chicago, and it is only about one block from Lincoln Park, a large city park.

Since the building was constructed there has been a great change in the character of the neighborhood in which it is located, with the result that since 1924 it has been reasonably certain that the valuable life of the building would expire not later than 1938. About 1921 there was constructed only one block away a large twelve story residence hotel. Many other large hotel and apartment buildings have since been constructed in the vicinity, so that in 1925 the neighborhood was typically one of twelve or fourteen story apartment buildings. This means that the value of real estate in this vicinity has advanced so much that only buildings of this large type can produce enough income to allow a reasonable return on the present value of the land.

8 The building in question occupies a particularly desirable and valuable corner. In view of the great increase in the value of the land, it was in 1925 definitely known that a building of this size and character, only three stories high and built in the style of 1915, could not profitably be maintained on this site for more than a limited period and, therefore that this building would have to be removed or destroyed not later than 1938, or thirteen years after that taxable year. Therefore the cost remaining unextinguished on January 1, 1925, should be charged off over the remaining thirteen years of useful life of the building.

At that time, depreciation at the rate of 2% per annum, based on physical life, had been allowable over the preceding ten years of life of the building, amounting to 20%. The unextinguished cost was therefore 80% of the original cost of $125,000. To charge this amount off over the remaining thirteen years requires an annual deduction of approximately

6% of cost, to properly reflect the actually accruing depreciation, ~~including~~ obsolescence.

6. Wherefore the petitioners pray that this Board may hear the proceedings, and redetermine the tax
9 liability of the petitioners, and determine that there is no deficiency due from the petitioners for the year 1925, and determine the amount overassessed and overpaid for that year which should be refunded to the petitioners.

JOSEPH E. SWANSON,
JAMES OTIS, and
ALLEN G. MILLS,
Trustees of
LAKE VIEW LAND ASSOCIATION,
Petitioners.
By ARNOLD R. BAAR- (Signed)
Arnold R. Baar,
Counsel for Petitioners
230 S. Clark Street
Chicago, Illinois.

Of Counsel,
KIXMILLER & BAAR
Chicago, Illinois
Washington, D. C.

10 State of Illinois }
County of Cook } ss

JOSEPH E. SWANSON and ALLEN G. MILLS, being first duly sworn, say that they are duly qualified and acting trustees of Lake View Land Association and as such trustees they are two of the petitioners above named, and that they are duly authorized to verify the foregoing petition on behalf of the petitioners, as trustees of said trust; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

JOSEPH E. SWANSON (Signed)
Joseph E. Swanson
ALLEN G. MILLS (Signed)
Allen G. Mills

Subscribed and sworn to before me this 28th day of November, A. D. 1927.

R. W. HAYNIE
Notary Public.

11 Form NP-2

TREASURY DEPARTMENT.
Washington

Office of
Commissioner of Internal Revenue

IT:FAR:A1
JDL-60D

Oct 1 1927.

Lake View Land Association,
c/o Willoughby and Company,
77 West Washington Street,
Chicago, Illinois.

Sirs:

The determination of your income tax liability for the calendar year 1923, 1924 and 1925, pursuant to an examination of your books of account and records, as set forth in office letter dated August 30, 1927, discloses an additional tax of $1,635.27 for the year 1925, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT: FAR:A1; JDL-60D. In the event that you acquiesce in a part

of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.

By.....
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

12 Statement.

IT:FAR:A1
JDL-60D

In re: Lake View Land Association,
c/o Willoughby and Company,
77 West Washington Street,
Chicago, Illinois.

Year.	Deficiency in Tax	Overassessment
1923	None	None
1924	None	None
1925	$1,635.27	

1923

No change.

1924

No change.

1925

Net income reported (Form 1041)	$16,067.52
Deductions:	
Depreciation increased	1,250.00
Net income corrected	$14,817.52

Explanation of Adjustments

Depreciation deducted on valuation of $125,000.00 at 3%	$ 3,750.00
Depreciation allowed on valuation of $125,000.00 at 4%	5,000.00
Depreciation increased	$ 1,250.00

The above adjustment has been made in conformity with Article 161 of Regulations 65.

Computation of Tax.

Net income corrected	$14,817.52
Less: Exemption	2,000.00
Balance taxable at 13%	$12,817.52
Income tax at 13%	$ 1,666.28
Total tax assessable	$ 1,666.28
Tax previously assessed, April 1926, Account #852,421 (Form 1040)	31.01
Deficiency in tax	$ 1,635.27

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this communication is being furnished your representative KixMiller and Baar, Attorneys, in accordance with the authority conferred in your power of attorney.

13 UNITED STATES BOARD OF TAX APPEALS.

(Caption—32572)

ANSWER.

Filed Jan 28 1928.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits that the notice of deficiency, a copy of which is attached to the petition, was mailed to the taxpayers on October 1, 1927.

3. Admits that the taxes in controversy are income taxes for the calendar year 1925 and that the amount of the deficiency is $1,635.27.

4. (a) Admits that in determining the tax liability for the year 1925 the Commissioner has treated the Lake View Land Association, of which petitioners are trustees, as an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1924 and Article 1502

of Regulations 65, but denies that any error was committed in so doing. Denies the remaining allegations set forth in subparagraph (a) of paragraph 4 of the petition.

(b) Admits that in his determination of the amount deductible as a reasonable allowance for depreciation, including
14 obsolescence, the Commissioner has allowed a rate of 4 per cent on the property of the petitioners; but denies that any error was committed in allowing such rate, and denies that any greater rate should be allowed for depreciation, including obsolescence.

5 (a), (b). Denies the allegations set forth in subparagraphs (a) and (b) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the petitioner's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
IRWIN R. BLAISDELL,
Special Attorney, Bureau of Internal Revenue.

HDT—abl
1-27-28

UNITED STATES BOARD OF TAX APPEALS.

Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association, *Petitioners,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No: 41318.

PETITION.

Filed Nov. 5, 1928.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:AR:A—3:DPS—60D), dated September 6, 1928, and as a basis of their proceedings allege as follows:

1. The petitioners are the duly qualified and acting trustees of a trust created under declaration of trust, under the laws of the State of Illinois, and its address is c/o Willoughby & Company, 77 W. Washington Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached, was mailed to the taxpayers on September 6, 1928, as the petitioners believe.

3. The taxes in controversy are income taxes for the calendar year 1926. The deficiency asserted is $1,157.57, all of which is in controversy, and the petitioners claim that a refund is due to them.

16 4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) Status of Petitioners for Tax Purposes.—In determining the tax liability for the year 1926, the Commissioner has erroneously treated the petitioners, as trustees, as if the trust were an association taxable as a corporation under the provisions of Section 2 (a) (2) of the Revenue Act of 1926 and Article 1502 of Regulations 69. Petitioners allege, however, that the trust does not constitute an association under the statute and that its income is properly taxable as the income of a trust fiduciary, under Section 219 of the Revenue Act of 1926. The income received by the petitioners, being currently distributable, is properly taxable only to the beneficiaries under Section 219 (b) (2) of the Revenue Act of 1926.

(b) Allowance for Depreciation, Including Obsolescence.—In his determination of the amount deductible as a reasonable allowance for depreciation, including obsolescence, of the building owned by the petitioners, the Commissioner has erroneously computed the amount of such a deduction upon the basis of a rate of 4% of cost, whereas a rate of approximately 6% should be used as a reasonable rate for such depreciation, including obsolescence.

5. The facts upon which the petitioners rely are as follows:

(a) Status of Petitioners for Tax Purposes.—Under the declaration of trust, under which the above mentioned
17 trust was organized, and in the activities and practices of the trustees thereunder, the said trust has none of the essential characteristics of an association under the statute and regulations, but is merely a trust estate.

The declaration of trust states that the trust was organized to acquire title to a specified parcel of real estate, to be held under the trust. The activities of the trust have consisted merely of the holding of this property and the collection of the income from the apartment building with which it is improved, and the distribution of the net income among the beneficiaries. The operation of the property is in the hands of agents, as would be the case under any testamentary or other strict trust.

The trustees are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. The beneficiaries have no control over the trust and under the declaration of trust the beneficiaries have no functions or powers except the right to amend the declaration of trust by the agreement of the holders of three-fourths or more in value of the receipts issued to beneficiaries.

The organization of the trust does not in any manner resemble the form or methods used by incorporated bodies. No provision is made for managing officers but all powers are exercised by the three trustees, or, subject to certain limitations, by any two of them. The trustees are not associated together with similar or greater powers than the directors in a corporation nor is the trust organized for the purpose of
18 carrying on any business enterprise.

The net income in the hands of the trustees is required by the declaration of trust to be paid and divided to and among the beneficiaries semi-annually or oftener, in the discretion of the trustees, and such net income has been currently distributed to the beneficiaries as thus required, (with

the exception of a small amount of income of 1926 which was not distributed and was reported as the income of the trust estate).

(b) Allowance for Depreciation, Including Obsolescence.—The building owned by the trust is an apartment building of three stories and basement, which was constructed in 1915, and which contains 9 apartments of 7 to 10 rooms each, which are rented to produce the income of the trust. It is located on the corner of Briar Place and Sheridan Road, the latter being one of the principal boulevards in Chicago, and it is only about one block from Lincoln Park, a large city park.

Since the building was constructed there has been a great change in the character of the neighborhood in which it is located, with the result that since 1924 it has been reasonably certain that the valuable life of the building would expire not later than 1938. About 1921 there was constructed only one block away a large twelve story residence hotel. Many other large hotel and apartment buildings have since been constructed in the vicinity, so that in 1925 the neighborhood was typically one of twelve or fourteen story apartment build-
19 ings. This means that the value of real estate in this vicinity has advanced so much that only buildings of this large type can produce enough income to allow a reasonable return on the present value of the land.

The building in question occupies a particularly desirable and valuable corner. In view of the great increase in the value of the land, it was in 1925 definitely known that a building of this size and character, only three stories high and built in the style of 1915, could not profitably be maintained on this site for more than a limited period and therefore that this building would have to be removed or destroyed not later than 1938, or thirteen years after that taxable year. Therefore the cost remaining unextinguished on January 1, 1925, should be charged off over the remaining thirteen years of useful life of the building.

At that time, depreciation at the rate of 2% per annum, based on physical life, had been allowable over the preceding ten years of life of the building, amounting to 20%. The unextinguished cost as of January 1, 1925, was therefore 80% of the original cost of $125,000. To charge this amount off over the remaining thirteen years requires an annual deduction of approximately 6% of cost, to properly reflect the actually accruing depreciation, including obsolescence.

6. Wherefore the petitioners pray that this Board may hear the proceedings, and redetermine the tax liability of the

petitioners, and determine that there is no deficiency due
20 from the petitioners for the year 1926, and determine the amount overassessed and overpaid for that year which should be refunded to the petitioners.

JOSEPH E. SWANSON,
JAMES OTIS, and
ALLEN G. MILLS,
Trustees of
LAKE VIEW LAND ASSOCIATION
Petitioners,

ARNOLD R. BAAR (Signed)
Arnold R. Baar
WILBUR A. GIFFEN (Signed)
Wilbur A. Giffen
Counsel for Petitioners,
230 S. Clark Street,
Chicago, Illinois.

Of Counsel:
KIXMILLER, BAAR & HOFFMAN,
Chicago, Illinois,
Washington, D. C.

21 State of Illinois } ss
County of Cook }

JOSEPH E. SWANSON and ALLEN G. MILLS, being first duly sworn, say that they are duly qualified and acting trustees of Lake View Land Association and as such trustees they are two of the petitioners above named, and that they are duly authorized to verify the foregoing petition on behalf of the petitioners, as trustees of said trust; that they have read the foregoing petition and are familiar with the statements contained therein, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and those facts they believe to be true.

JOSEPH E. SWANSON (Signed)
Joseph E. Swanson
ALLEN G. MILLS (Signed)
Allen G. Mills

Subscribed and sworn to before me this 2nd day of November, 1928.

R. W. HAYNIE (Signed)
Notary Public.

22 TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

Sept. 6, 1928

Lake View Land Association,
Joseph E. Swanson, Trustee,
77 West Washington Street,
Chicago, Illinois.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of $1,157.57, as shown in the attached statement.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter for a redetermination of your tax liability. However, if you acquiesce in this determination, you are requested to execute the enclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,
D. H. BLAIR,
Commissioner.
By W. T. SHERWOOD (Signed)
Acting Deputy Commissioner.

Enclosures:
Statement
Form 866
Form 882

23 Statement

IT:AR:A-3
DPS-60D

In re: Lake View Land Association,
Joseph E. Swanson, Trustee,
77 West Washington Street,
Chicago, Illinois.

Year 1926	Deficiency in Tax $1,157.57
Net income reported on Form 1041	$13,074.57
Deduction:	
Additional depreciation	2,500.00
Net income as adjusted	$10,574.57
Less:	
Exemption	2,000.00
Balance subject to tax at 13½%	$ 8,574.57
Tax at 13½%	$ 1,157.57
Tax previously assessed	None
Deficiency in tax	$ 1,157.57

Depreciation has been adjusted in accordance with Article 161, Regulations 69.

The association is held to be a corporation and taxable under the provisions of Section 230 of the Revenue Act of 1926.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—41318) * *

ANSWER.

Filed Jan 5—1929.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1926. Admits that the proposed deficiency which is in controversy amounts to $1,157.57.

4(a) and (b). Denies that the Commissioner erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a) and (b). Denies the allegations of subparagraphs (a) and (b) of paragraph 5 of the petition.

Denies each and every other allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petition be dismissed and the appeal denied.

(Signed) C. M. CHAREST
C. M. Charest,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
A. H. FAST,
HAROLD D. THOMAS,
Special Attorneys,
Bureau of Internal Revenue.

25 UNITED STATES BOARD OF TAX APPEALS.

(Caption—32572 and 41318)

Arnold R. Baar, Esq., for the petitioners.

E. A. Tonjes, Esq., for the respondent.

MEMORANDUM OPINION.

MCMAHON: These proceedings duly consolidated for hearing are for the redetermination of asserted deficiencies in income taxes as follows:

Docket No.	Year	Amount
32572	1925	$1,635.27
41318	1926	1,157.57

It is alleged that the respondent erred in the determination of the asserted deficiencies (1) in treating the Lake View Land Association as an association taxable as a corporation under the provisions of section 2(a)(2) of the Revenue Act of 1926, and (2) in computing the amount deductible for depreciation and obsolescence of the building held by the petitioners in trust by using the rate of four per cent instead of the rate of approximately six per cent.

The petitioners are the present trustees of the Lake View Land Association created under a trust agreement dated
26 June 1, 1915, entered into by and between Ralph C. Otis and Joseph E. Swanson, both of Chicago, and Allen G. Mills of Glencoe, all in the County of Cook and State of Illinois, for the benefit of Otis and Swanson.

The agreement provides that the contracting parties will acquire title to certain described real estate in the County of Cook and State of Illinois, and the buildings and improvements situated thereon; and that title shall be held by the contracting parties and by their successors in trust as joint-tenants, but not as tenants in common.

The agreement further provides as follows:

> (3) The Trustees shall have exclusive management and control of the real estate above described, and of any and all buildings and improvements so purchased by them or erected upon said real estate or any of the same; they may and shall collect all income, rents and profits of said real estate, buildings and improvements, and may

and shall pay all taxes, assessments and public charges of every kind and nature whatsoever thereon, and shall also pay any and all such costs, charges and expenses of every description connection with or growing out of the execution of the trust by this instrument created as in the exercise of their sole and absolute discretion the Trustees may deem proper or necessary. The Trustees shall also have full power and authority to lease any and all of said real estate, or the buildings or improvements thereon or any part thereof, or any interest in the same, for a term or terms of one hundred and ninety-eight (198) years, or for any shorter or longer period, or for a term or terms beyond the possible termination of this trust, on such terms and conditions as they may deem best; to erect, construct, tear down, alter, reconstruct, rebuild or remodel such buildings or other improvements whatsoever on said real estate or any part thereof as they in their sole discretion shall think best; and to borrow such sums of money as they may deem best, on such terms as they may approve, and to secure the payment of the same by mortgage or trust deed on any or all of said real estate and the buildings and improvements thereon, which power shall be deemed to include power to renew or extend the loan or loans so secured as aforesaid; provided, however, that the aggregate of loans secured by mortgage or trust deed on real estate shall not exceed in amount sixty per cent. (60%) of the value of all real estate and buildings belonging for the time being to the trust estate. The Trustees shall also have power at any time to sell any or all of said real estate or the buildings or improvements thereon, at
27 public or private sale, for cash or on credit, or partly for cash and partly on credit, and on such other terms and conditions as to the Trustees may seem best; and to exchange any or all of said real estate, buildings, or improvements for any other property which the Trustees in their sole discretion may select; and in case there be in their opinion any inequality in value between the value of the property desired so to be exchanged and the value of the property for which it is desired to exchange the same, the Trustees may equalize such inequality by paying or transferring or receiving, as the case may be, money or other property therefor; to grant and acquire easements; to insure and keep insured, in such insurance

companies and to such amounts as the Trustees may determine, the said buildings and improvements against fire, breakage and all other casualties, and themselves as Trustees and the trust estate with respect to accidents, and to pay the premiums therefor; to make any and all repairs which the Trustees may deem necessary or advisable; to hire suitable offices for the transaction of the business of the trust hereby created and pay the rental therefor; to employ all such agents and servants and all such attorneys to law, either from among their own number or otherwise, as the Trustees may deem advisable in connection with the execution of the trust hereby created, and to fix and pay out of the trust estate the compensation of all such agents, servants and attorneys at law employed by the Trustees; to do all such acts, execute all such instruments and papers and expend all such moneys as in their discretion the Trustees may deem proper or advisable in connecttion with the trust hereby created; to settle, adjust, compound or compromise any claim or claims, demand or demands, of any kind or description whatsoever that may at any time be brought or made either against the Trustees as Trustees hereunder or on their behalf as such Trustees against any other person or persons; and also to incur and pay out of the trust estate all such other expenses of every kind and description whatsoever as in the sole discretion of the Trustees shall seem to them necessary or advisable in the proper execution of the trust hereby created.

(4) Each and every sale, mortgage, conveyance, pledge, lease, exchange and all other transactions hereinabove authorized may be made to and with any person or persons, natural or corporate, or any other board of trustees (including corporations and trusts in which the Trustees hereunder or any of the same may be officers or trustees, respectively), on all such terms, agreements and conditions, and by all such forms of conveyance and other instruments, as may in their discretion seem best to the Trustees hereunder.

(5) The Trustees for their services as Trustees hereunder may receive compensation as Trustees (as distinguished from their compensation as agents, servants or attorneys), to be fixed by themselves and paid out of the
28 trust estate, provided, however, that the compensation of

the Trustees as such shall not exceed two and one-half (2½) per cent. of the gross income of said trust.

(6) After making proper provision for the payment of outstanding claims, the net income in the hands of the Trustees shall, semi-annually or oftener, in their discretion, be paid and divided to and among the beneficiaries according to their respective interests hereunder. The Trustees shall upon the request of any beneficiary render a written annual account to the beneficiaries.

(7) Neither the Trustees nor any beneficiary hereunder shall ever be personally liable for any money borrowed or for any debt or liability on account of any mortgage, contract or other instrument or on account of any act done by the Trustees in the exercise of any of the powers hereby conferred upon them or in pursuance of any of the provisions of this agreement, and all persons dealing with the Trustees shall look only to the property of the trust for the payment of their claims, and every lease, mortgage, contract or other instrument, to which the Trustees may be parties or on account of which any debt or liability may be chargeable against the trust estate, shall, in substance, so provide; it being understood, however, that the omission of said provision, through inadvertence, shall not subject the Trustees nor any beneficiary to personal liability. Any person lending or othewise paying any money or transferring any securities or any other property whatsoever other than money to the Trustees shall not be required to see to the application of such money or securities or other property.

(8) The interest of the beneficiaries hereunder as evidenced by the receipts issued by the Trustees shall be held and construed to be personal property, and said receipts or interest shall not be construed or held to be an interest in or evidence of an interest in real estate. The beneficial interests in the net profits, proceeds and avails of this trust shall, in the first instance, be represented by one thousand (1000) shares of the par value of One Hundred Dollars ($100) each, aggregating the sum of One Hundred Thousand Dollars ($100,000) par value. Ralph C. Otis and Joseph E. Swanson shall each be the original owners of five hundred (500) of said shares; and said original owners or their assigns, personal representatives or successors in interest may each receive three hundred seventy-five (375) additional shares of the par value of

One Hundred Dollars ($100.00) each, at any time after an existing insumbrance of Seventy-five Thousand Dollars ($75,000) upon said premises has been paid.

(9) The Trustees shall keep a written register of the names and addresses of all beneficiaries, which names and addresses shall be furnished to the Trustees by the bene-
29 ficiaries, respectively, immediately upon the issuance by the Trustees of receipts to the respective beneficiaries.

Any such interest may be transferred by any beneficiary or by his attorney-in-fact or legal representative, in the following manner, viz.: Any beneficiary, or the attorney-in-fact or legal representative of any beneficiary, who desires to transfer the interest evidenced by this receipt, may in writing request the Trustees to offer said interest for sale to the other beneficiaries. Within ten days after the Trustees shall have received said request, the Trustees shall send by mail a written notice to the other beneficiaries, whose names shall have been registered as aforesaid, at their respective addresses, registered as aforesaid, which said notice shall contain the offer aforesaid and the cash price, to be fixed and determined by the beneficiaries in their sole discretion, at which said interest is offered. Within thirty days from the date of the mailing of said notice, any of said beneficiaries may in writing signify to the Trustees his or their wish to purchase said interest at the price aforesaid, and the said sale shall thereupon be effected by the assignment of the receipt evidencing said interest, by the surrender of the same to the Trustees, and by a notation of such assignment on the books of the Trustees. In case two or more of said other beneficiaries shall in the manner aforesaid signify to the Trustees their wish to purchase said interest at said price, said interest shall be divided among said two or more beneficiaries in proportion to the respective amounts of their receipts, and said sale shall accordingly be effected by the assignment, surrender and notation as aforesaid. If, within the period of thirty days aforesaid, none of said other beneficiaries shall signify their wish to effect such purchase as aforesaid, then said receipt may be thereupon transferred by the holder of such receipt, at the same price as that fixed and determined as aforesaid, to any person or persons, whether theretofore a beneficiary or beneficiaries hereunder or not, which transfer shall be effected by the as-

signment of the receipt evidencing said interest, by the surrender of the same to the Trustees and by a notation of such assignment on the books of the Trustees. The Trustees shall not be under obligation to give the notice above provided with respect to any receipt until after the expiration of ninety days from the date of mailing said notice with respect to any of the other receipts.

Upon the effecting of a transfer in any of the ways above mentioned, a new receipt of receipts shall be issued by the Trustees to the transferee or transferees, who shall thereupon become subject to all of the terms and provisions of this agreement. The issuance of any receipt by the Trustees shall be conclusive evidence of the validity of such receipt, of the interest (which said receipt purports to evidence) of the person or persons in whose name or names the same is issued, and of the fact that the foregoing provisions of this paragraph numbered (9) have been complied with and that such receipt has been duly issued.

The Trustees shall never be liable except to the beneficiaries registered as aforesaid, nor shall the Trustees be liable to any person for issuing any receipt to the transferee named in any transfer or made by the registered beneficiary or by his attorney-in-fact or legal representative, nor shall the Trustees be bound to inquire into the legality or cause of any such transfer. The Trustees shall not be chargeable with any notice of any change in any beneficiary's interest unless such change is made by operation of law or is evidenced by a transfer and sale made in one of the ways above provided.

(10) Any Trustee under this agreement may resign his trust by a written instrument, executed and acknowledged and recorded in the office of the Recorder of Deeds of Cook County, Illinois. Vacancies in the number of the Trustees occuring at any time from any cause shall, within six months after such vacancies, respectively, occur, be filled by the remaining Trustees or by the remaining Trustee, if there be only one, by a written instrument, executed, acknowledged and recorded as aforesaid, designating some other person or persons, as the case may be, as Trustee or Trustees hereunder, and the person or persons so designated shall thereafter have all and the same powers (including all discretionary powers) and all and the same estate (without the necessity of any convey-

ance) as if originally named as Trustee or Trustees herein. Any Trustee may by power of attorney delegate his power hereunder for a period not exceeding one year at any one time to any other Trustee or to the other Trustees hereunder. Excepting the case of filling vacancies as aforesaid, and the case of terminating this trust upon the decision of the Trustees, as provided in paragraph (11) hereof, all powers hereunder (including all discretionary powers) may be exercised and all deeds and other instruments may be executed by any two of the Trustees, provided, however, that no sale of real estate shall be made and no mortgage of real estate shall be made or assumed and no lease for a term exceeding five years shall be made except by all of the Trustees, or by two of the Trustees, one or both of whom shall be acting under a power of attorney from the third Trustee, authorizing him or them to make such sale or to make such mortgage or to make such lease for a term exceeding five years, as the case may be. No Trustee hereunder shall be required to give a bond.

(11) At the expiration of twenty (20) years after the death of the last survivor of the following persons, viz.: James Otis, Ralph Chester Otis and Sarane Otis and Florence Otis, children of Ralph C. Otis aforesaid, and Joseph B, Swanson and Ralph E. Swanson, children of Joseph
31 E. Swanson aforesaid, or at any time before the expiration of the twenty years last aforesaid when all the Trustees, in their discretion, shall decide so to do, the Trustees shall terminate this trust by selling all of the property held by them as such, and (after the satisfaction and discharge of all of the debts and liabilities of the trust estate of every kind and description whatsoever) by dividing the net proceeds of such sale, and any and all other moneys then remaining in the hands of the Trustees, among the registered beneficiaries in proportion to the respective amounts of their interest. Upon the termination of this trust in the manner hereinabove provided, the Trustees shall execute and acknowledge and record in the office of the Recorder of Deeds of Cook County, Illinois, a certificate stating the fact of such termination, which certificate shall be conclusive evidence of all of the facts therein stated, and thereupon this trust shall be deemed fully terminated without any further act or deed on the part of the Trustees or any of them and without any act or deed on the part of any beneficiary.

(12) The Trustees shall be entitled to full and complete indemnity out of the trust estate against any and all liabilities incurred by them as Trustees under this agreement, except only as to such liabilities as shall proximately result from their own wilful misconduct. The discretion of the Trustees, when exercised with respect to any matter or thing in regard to which the exercise of discretion by the Trustees is by any of the provisions of this agreement permitted, shall be final and shall bind all the beneficiaries hereunder and all persons acquiring or having any interest in or under this agreement.

(13) This agreement may be amended by an agreement in writing of the registered beneficiaries holding three quarters or more in value of the receipts issued hereunder, and such agreement shall be absolutely binding upon all of the beneficiaries hereunder and also upon the Trustees; but the right of any third person shall not be affected by any such amendment, nor shall any third person be deemed to have notice thereof, until a certificate setting forth such amendment, executed and acknowledged by the Trustees, shall be recorded in the office of the Recorder of Deeds of Cook County, Illinois, and such certificate shall be conclusive evidence of the validity of the amendment certified to and as to all the facts therein stated.

* * * *

Joseph E. Swanson and Ralph C. Otis were offered by a real estate broker a piece of vacant land at the corner of Briar Place and Sheridan Road, later known as No. 3122 Sheridan Road, in the City of Chicago, Illinois, at a price which they considered very low and they agreed to purchase the property with the view of improving it by erecting
32 an apartment building. Swanson and Otis purchased the property in 1914, Swanson taking title thereto. Originally 135 feet were purchased for $27,000. However, before they started to build, 50 feet thereof were sold for $17,500, so that the remaining property cost them $9,500. Swanson and Otis approved plans and let contracts for the construction of a three-story apartment building containing nine apartments of seven, eight and eleven rooms, respectively. Swanson and Otis secured a mortgage loan from the Central Trust Company of $75,000. Otis and Swanson both contributed equally a total of not over $30,000. The building was completed on May 1, 1914, before the trust agreement was executed.

At the suggestion of their attorney, the trust agreement was executed as a safer way of carrying the title. The Lake View Land Association, therefore, acquired a completed building and the land upon which it stood.

Pursuant to the terms of the trust agreement, Otis and Swanson, each received 500 shares of the par value of $100 each, representing their interest as beneficiaries. The other trustee owns no beneficial interest in the property.

The shares of Swanson and Otis were later transferred as follows:

Oct. 31, 1917 500 shares Otis to Sarene S. Otis (wife)
Jan. 2, 1920 500 shares Swanson to Esther L. Swanson (wife)

Sarane S. Otis and Esther L. Swanson were the owners of all the beneficial interest in the Lake View Land Association in 1925 and 1926. Although Swanson and Otis transferred their beneficial shares to their wives, respectively, then continued as trustees. In about 1926, James Otis, the son of Ralph C. Otis succeeded his father as trustee.

Joseph E. Swanson, in 1915 and until January 1, 1932, was a partner in the partnership known as Willoughby & Company, hereinafter referred to as the "Company," which partnership became a corporation on January 1, 1932. It
33 was engaged in the business of buying and selling real estate as a broker and also managing properties. In 1915, it was acting as manager of not less than 12 properties, other than the Lake View Land Association property. Ralph C. Otis was not a member of the Company, but he officed with the Company, because of his interest in the estate of Joseph E. Otis, for which estate the Company acted as agent.

The Company was engaged as manager of the Lake View Land Association property. It negotiated the original leases, which were at first for terms of from three to five years. In later leases, the term varied. It attended to the redecorating, purchasing of coal, checking and paying of light bills, employing a janitor and attending to all matters relating to service and condition of the building. It kept separate books of account covering the property. It distributed the net income about four times a year.

The affairs of the Lake View Land Association were handled by the Company in the regular routine of its office by its employees. Ralph C. Otis and Swanson directed the management of the property and frequently discussed matters pertaining to the operation of the building. The entire affairs of

the Lake View Land Association were at all times in their hands.

During the entire existence of the Lake View Land Association, the three trustees as such did not assemble in formal meetings. They never adopted resolutions or took other formal action with reference to the affairs of the property. They kept no minute book. They never adopted or had any by-laws or a code of rules. The Lake View Land Association had no officers and no board of directors, except the trustees. The trustees never determined the amounts of income to be distributed. The beneficiaries as such never acted by vote on any matter, nor were any questions submitted to them for their action. The trustees did not address any communication to the beneficiaries.

34 About 1920-1921, the Belmont Hotel, a high class residential apartment hotel about 14 to 16 stories high was constructed about a block from the Lake View Land Association building. The Fullerton Parkway Land Trust Building is a mile south of the building here involved. In 1922, the Barry Building, a 16-story building of the finest type, was constructed alongside of this property. This was the second large building constructed in that section and thereafter about 75 per cent of the boulevard frontage from Briar Place up for about a mile was improved with 13 to 20 story buildings. In 1925, there were five 3-story apartment buildings fronting on the boulevard in that section. About 50 per cent of the improvements were made prior to 1925 and an equal amount since 1925.

The apartments in the building were rented unfurnished, the monthly rental ranging from $135 to $350. In 1915, the rent for a lower 7-room apartment was $135 a month and in 1929 the highest priced apartments rented for $375 a month. The original annual rental was about $21,000. In 1920 the total annual rentals were approximately $22,000 and increased to about $28,000 in 1926, and later to $30,000. Swanson lived in one of the apartments from May 1, 1914 until 1926.

From 1915 to 1925, operating expenses doubled, the coal increasing in price from $4 to $8 and the painting and redecorating from 62 cents an hour to $1.75 an hour.

During 1925, land in the neighborhood of the property involved herein sold for $1,200 a foot. Swanson and Ralph C. Otis had several opportunities to sell the property, being offered as high as $1,500 a front foot for what they had in the years of 1925 to 1929. However, they did not sell. As land

values increased the taxes increased, the taxes for 1930
35 and 1931 being $5,600 for each year. Taxes had increased substantially in 1925 and were assessed with reference to current values.

When the property was purchased, property along Sheridan Road had not been developed to a great extent; there were a few houses here and there. Sheridan Road is a boulevard running along Lake Michigan. The building was constructed to rent at good rates and the rents received in the first years were considered good. In 192[illegible] and 1926, Swanson and Otis considered remodeling the building into 4-room kitchenette apartments but it was deemed too expensive and they determined to operate the property as advantageously as possible until they could improve it with a type of building corresponding with other buildings on the street. However, at sometime, the 11-room corner apartments being difficult to rent were divided into four and six room apartments.

The Lake View Land Association never acquired any real estate other than that heretofore referred to and the trustees have never negotiated for the purchase of any other property. There have been no negotiations for the sale of it. They had many opportunities to sell the property at a large profit but they did not want to sell because they thought they would rather keep it and rebuild or properly improve it themselves. In 1926 Swanson was of the opinion that the real estate market was going to continue to advance. Ewanson had no idea as to the length of time that the building could economically remain on the site. It occurred to Swanson and Ralph C. Otis in 1925 that the building could not be permitted to remain there longer than 1929, in view of the other building operations in that vicinity. They had several "schedules for improvements with a tall building" and probably would have changed the improvements had not conditions changed as they did in 1930. The third trustee was not consulted on the matter.

36 The parties stipulated that the amount of $125,000 is the proper basis for the computation of depreciation and obsolescence.

The respondent, as shown by respective statements attached to deficiency notices, adjusted deduction for depreciation as follows:

Year 1925.

Depreciation deducted on valuation of $125,000 at 3%	$ 3,750.00
Depreciation allowed on valuation of $125,000 at 4%	5,000.00
Depreciation increased	$ 1,250.00

Year 1926.

Net income reported on Form 1041	$13,074.57
Deduction:	
Additional depreciation	2,500.00
Net income as adjusted	$10,574.57

The trust agreement involved in this proceeding and the facts are substantially similar to the agreement and facts in *Joseph E. Swanson, et al., Trustees,* 29 B. T. A. ..... (Docket Nos. 32571 and 41308), promulgated ..... The questions in those proceedings are likewise similar to these in the instant proceeding. Therefore, upon authority of *Joseph E. Swanson, et al., Trustees, supra,* we conclude that the Lake View Land Association is an association within the meaning of section 2(a) (2) of the Revenue Act of 1926, and also approve the action of the respondent with respect to his computation of the allowance for depreciation including obsolescence.

Decision will be entered for the respondent.

Entered Feb 26 1934.

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 26, 1934, it is

Ordered and Decided: That there is a deficiency of $1,635.27 for the year 1925.

Entered Feb. 28, 1934.

(Signed) STEPHEN J. MCMAHON,
Member.

(Seal)

38 UNITED STATES BOARD OF TAX APPEALS. Decision 41318.

* * * (Caption—41318) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 26, 1934, it is

Ordered and Decided: That there is a deficiency of $1,157.57 for the year 1926.

Entered Feb. 26, 1934.

(Signed) STEPHEN J. McMAHON,
Member.

(Seal)

43 UNITED STATES BOARD OF TAX APPEALS. Notice fil 21, 193

* * (Caption 32572 and 41318) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed May 21, 1934.

To: Robert H. Jackson, Esq.
General Counsel, Bureau of Internal Revenue
Washington, D. C.
Counsel for Commissioner of
Internal Revenue, Respondent.

Please take notice that the above named petitioners, by their undersigned attorney, filed with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., on the twenty-first day of May, 1934, their petition for review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision of the Board rendered in each of the above entitled causes. A copy of the petition for review and of the assignments of error as filed with the Board is hereto attached and served upon you.

Respectfully,
ARNOLD R. BAAR (Signed)
Attorney for Petitioners,
11 South La Salle Street,
Chicago, Illinois.

Acknowledgment of Service.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged and having been made on this twenty-first day of May, 1934.

ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue, Counsel for Commissioner of Internal Revenue.

May 21. 39 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572 and 41318) * *

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Filed May 21, 1934.

To The Honorable Judges of Said Court:

Now come Joseph E. Swanson, James Otis, and Allen G. Mills, as Trustees of the Lake View Land Association, by Arnold R. Baar, their attorney, and petition the United States Circuit Court of Appeals for the Seventh Circuit for a review of the decisions of the United States Board of Tax Appeals rendered and entered on the twenty-eighth day of February, 1934, in Causes numbered 32572 and 41318 on the docket of said Board, wherein they were petitioners and the Commissioner of Internal Revenue was respondent, and in support of their petition respectfully shows this Honorable Court as follows:

40 Venue.

The petitioners are individuals and inhabitants of the judicial circuit of this Honorable Court. The income tax returns of the petitioners as trustees of the Lake View Land Association for the taxable years 1925 and 1926 were filed in the office of the Collector of Internal Revenue for the First District of Illinois, which office is, and was at the time the return was filed, located at Chicago, Illinois, within said judicial circuit.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtues of the laws of the United States.

Jurisdiction.

The Circuit Court of Appeals for the Seventh Circuit has jurisdiction to review the said decision of the United States Board of Tax Appeals by virtue of the Provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926 as amended by Section 603 of, the Revenue Act of 1928 and as further amended by Sections 1101 and 1102 of the Revenue Act of 1932.

Nature of The Controversy.

The controversy between the petitioners and the respondent herein involves the distinction between a trust which is subject to income tax as a fiduciary under Section 219 of the Revenue Acts of 1924 and 1926, and one which is an "association" under Section 2 (a) (2) of the Revenue Acts of 1924 and 1926, and therefore subject to income tax as a corporation under Part III of Title I of said Revenue Acts.

41 Petitioners, as trustees of a single piece of real estate, reported as fiduciaries the trust income for the calendar years 1925 and 1926, showing no income tax due. The Commissioner of Internal Revenue, respondent herein, and the United States Board of Tax Appeals, held that this income was subject to corporation income taxes, which resulted in the determination that there is a deficiency in income tax of $1,635.27 for the year 1925 and of $1,157.57 for the year 1926.

Assignments of Error.

The petitioners say that in the record and proceedings before the United States Board of Tax Appeals, and in the decision and final order of redetermination rendered and entered by said Board in each said cause, manifest error occurred and intervened to the prejudice of the petitioners, and they assign the following errors, and each of them, which they aver, occurred in the said record, proceedings, decision and final order of redetermination, to wit:

(1) The Board erred in not holding and deciding as a

matter of law that the petitioners were taxable as fiduciaries under Section 219 of the Revenue Acts of 1924 and 1926.

(2) The Board erred in holding and deciding as a matter of law that the Lake View Land Association was an association taxable as a corporation for income tax purposes under the Revenue Acts of 1924 and 1926.

(3) The Board erred in that its decision in each cause is contrary to and unsupported by its findings of fact.

(4) The Board erred as a matter of law in not holding and deciding that there is no deficiency in income tax for the years 1925 and 1926.

42 Wherefore, being aggrieved by said holdings and conclusions of law contained in or reflected by the findings and opinion of the Board and by the decision entered pursuant thereto, petitioners pray that the decision of said Board be reviewed and reversed and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected.

ARNOLD R. BAAR,
Arnold R. Baar,
Attorney for Petitioners,
11 South La Salle Street,
Chicago, Illinois.

Verification.

State of Illinois }
County of Cook } ss.

ARNOLD R. BAAR, being first duly sworn, deposes and says that he is counsel of record for the petitioners in the above named cause and as such he is duly authorized to verify said petition; that he has subscribed to the foregoing petition for review; that he has read said petition and is familiar with the statement therein contained; that the statements made are true to the best of his knowledge, information and belief.

ARNOLD R. BAAR.

Subscribed and sworn to before me this day, May 19, 1934.

LORETTA J. GALLAGHER,
Notary Public.

(Seal)

44 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572 and 41318) * *

PRAECIPE FOR RECORD.

Filed Jul 11 1934.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with the rules of said Court, a single consolidated transcript of the record in each of the above-entitled proceedings, and to include in said transcript of record, the following matters and documents, to-wit:

(1) Docket entries of all proceedings before this Board.
(2) All pleadings filed before the Board.
(3) Findings of fact and opinion by the Board.
(4) Order of redtermination.
(5) Petition for review.
(6) Notice to respondent of filing the petition for review.
(7) Acknowledgment by respondent of service of the notice of filing the petition for review and of a copy of the petition.
(8) This praecipe with acknowledgment by respondent of service thereof.

You are further requested to include only once in said transcript such matters and documents that are common to each proceeding, namely, items 3, 5, 6, 7, and 8 of this praecipe.

ARNOLD R. BAAR,
Attorney for Petitioners.

Acknowledgment of Service and Waiver.

Service of a copy of the foregoing praecipe on the 11th day of July, 1934, is hereby acknowledged. The privilege of filing a counter praecipe is hereby waived.

ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue,
Attorney for Respondent.

45 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—32572-41318) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 16th day of July, 1934.

B. D. GAMBLE,

(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 36, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of August, 1934, upon which the following entitled cause was heard and determined:

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5280, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 13th day of May, A. D. 1935.

FREDERICK G. CAMPELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord one thousand nine hundred and thirty-three, and of our Independence the one hundred and fifty-eighth.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
Petitioners,
5280 *vs.*
Commissioner of Internal Revenue,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

And afterwards, to-wit: On the twenty-first day of July, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. October Term, 1933.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter my appearance as counsel for Petitioner.

ARNOLD R. BAAR,
11 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed July 21, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of August, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. October Term, 1933.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter our appearance as counsel for Respondent.

ROBERT H. JACKSON,
Asst. General Counsel,

RICHARD W. WILSON,
Special Atty., Bureau of Int. Rev.

Endorsed: Filed August 30, 1934. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the City of Chicago, in said Seventh Circuit, on the second day of October, 1934, of the October Term, in the year of our Lord one thousand nine hundred and thirty-four, and of our Independence the one hundred and fifty-ninth.

And afterwards, to-wit: On the twelfth day of November, 1934, there was filed in the office of the clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5230. October Term, 1934.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

vs.

Commissioner of Internal Revenue.

The clerk will enter our appearance as counsel for Respondent.

FRANK J. WIDEMAN,
Assistant Attorney General,
SEWALL KEY,
A. F. PRESCOTT,
Special Assts. to the Atty. General.

Endorsed: Filed November 12, 1934. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighth day of January, 1935, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 8, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on January 17, 1935.

And afterwards, to-wit: On the twelfth day of January, 1935, there was filed in the office of the clerk of this court, a Motion to Reset Cause for hearing, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Joseph E. Swanson, *et al.*,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} No. 5280.

MOTION.

Comes now the Commissioner of Internal Revenue, respondent herein, by his undersigned attorney, and representing to the Court that counsel for the petitioner is agreeable to the granting of this motion, and moves the Court that the said case be removed from the day calendar of January 17, 1935 for argument, and to reset it for January 18, 1935.

DWIGHT H. GREEN,
United States Attorney, Attorney for Respondent.

Approved:
EVANS,
Judge.

Endorsed: Filed January 12, 1935. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twelfth day of January, 1935 the following further proceedings were had and entered of record, to-wit:

Saturday, January 12, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

On motion of counsel for petitioner, it is now here ordered that this cause be reset for hearing on January 18, 1935.

And afterwards, to-wit: On the eighteenth day of January, 1935, the following further proceedings were had and entered of record, to-wit:

Friday, January 18, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Asspciation,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Arnold R. Baar, counsel for petitioner, and by Mr. A. F. Prescott, counsel for respondent, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the tenth day of April, 1935, there was filed in the office of the clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5280. OCTOBER TERM, 1934, APRIL SESSION, 1935.

JOSEPH E. SWANSON, *et al.*, Trustees of the Lake View Land Association, *Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

} Petition for Review of Decisions of the United States Board of Tax Appeals.

April 10, 1935.

Before EVANS, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is a petition for review of decisions of the United States Board of Tax Appeals affirming the decision of the Commissioner of Internal Revenue that deficiencies of income tax were due from the Lake View Land Association. The Board found that the case is substantially the same as that of *Joseph E. Swanson, et al, Trustees of the Fullerton Parkway Land Trust*, 29 B. T. A. 1123, and is governed by the decision in that case. The only issue on this review is whether the income of the Lake View Land Association for the years 1925 and 1926 is subject to tax as the income of a trust under Section 219 of the Revenue Act of 1926 or as an "association" under Section 2 (a) (2) of that Act.

Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments. On June 1, 1915, they entered into a trust agreement for the

purpose of carrying the title to the real estate. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.

Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required. The agreement provided for the issuance of "receipts" to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued; that neither the trustees nor the beneficiaries should be personally liable and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary.

The case differs from that of Joseph E. Swanson, *et al*, Trustees of the Fullerton Parkway Land Trust in that the Lake View Land Association acquired a complete building, whereas, the Fullerton Parkway Land Trust purchased a piece of vacant property and erected the building upon it.

The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no by-laws. They elected no officers and no so-called board of directors.

From the above analysis of the agreement which created Lake View Land Association, the conclusion is inescapable that it was a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes. A group cannot organize and carry on business and escape taxation as a corporation on so slight a distinction.

In *Tyson* (*Chicago Real Estate Trust*) v. *Commissioner*, 68 F. (2d) 584, 587, this Court said:

> "That the organization of the trustees was of a very loose and informal character we think is not sufficient to take them out of the classification contemplated by the administrative regulations cited. Even though no formal meetings of the trustees were held, they had adopted a regular practice for the administration of their trust. * * *. It is true that neither the trustees nor the receipt holders ever drew up a code of rules or by-laws for the government of the trust, but such action seems entirely unnecessary in view of the comprehensive nature of the trust agreement under which they were organized in the first place. We think these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such taxable as a corporation."

Petitioners contend that they were not carrying on a business enterprise but were merely serving to hold the title to the real estate. It is true that the active management of the property seems to have been left to Joseph E. Swanson, one of the trustees who was also a member of a real estate firm known as Willoughby & Company. Ralph C. Otis had his office in the same building and frequently consulted with Swanson in regard to the management of the trust property. The question therefore resolves itself into this: Can the trustees avoid the conclusion that they are carrying on a business enterprise by turning the management of their affairs over to one of their number as a partner in another enterprise which handles the affairs of the association with the advice of the other trustees? We believe the answer to be that the trustees in this case were an association carrying on a business enterprise, personally and through their agents and employees.

AFFIRMED.

Endorsed: Filed April 10, 1935. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the tenth day of April, 1935, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 10, 1935.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,
5280 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the decisions entered in this cause on February 28, 1934, by the United States Board of Tax Appeals be, and the same are hereby affirmed.

And afterwards, to-wit: On the sixth day of May, 1935, there was filed in the office of the clerk of this court, a Praecipe for record, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Joseph E. Swanson, *et al.*, as Trustees of the Lake View Land Association,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} No. 5280.

PRAECIPE FOR RECORD.

To the Clerk of the Circuit Court of Appeals for the Seventh Circuit:

You are hereby requested to prepare and certify to the Supreme Court of the United States, on application for certiorari, a transcript of the record in the above-entitled cause, including therein, *inter alia*, the following:

(1) The complete printed transcript of the record in said cause.

(2) The opinion of the Court.

(3) The order affirming the decision under review.

(4) All other appropriate orders and proceedings, not including orders extending time for briefs and not including briefs of parties.

(5) This praecipe.

ARNOLD R. BAAR,
Counsel for Petitioners.

Endorsed: Filed May 6, 1935. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 39 to 48, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe file on the sixth day of May, 1935, in the case of

Joseph E. Swanson, *et al.*, Trustees of the Lake View Land Association,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5280, October Term, 1934, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 13th day of May, A. D. 1935.

FREDERICK G. CAMPELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is assigned for argument immediately following Nos. 78 and 79.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7086-C)